

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

YESICA V. LOPEZ PRADO

Claimant

V.

BERRY PLASTICS CORP./PACKERWARE

Respondent

AND

SAFETY NATIONAL CASUALTY CORP.

Insurance Carrier

Docket No. 1,066,733

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the May 27, 2015, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery. John B. Gariglietti of Overland Park, Kansas, appeared for claimant. J. Scott Gordon of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 9, 2014, preliminary hearing and exhibits thereto; the May 12, 2015, letter to ALJ Avery from Dr. Regina M. Nouhan; the February 2, 2015, independent medical evaluation (IME) report by Dr. Nouhan; the April 9, 2014, IME report by Dr. Brian J. Divelbiss; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges a June 2, 2013, right wrist injury by accident arising out of and in the course of her employment. ALJ Avery found:

Claimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment. The accident of 6/2/13 was the prevailing factor causing claimant's injury, medical condition and disability. Claimant suffered a new injury resulting in swelling and pain.¹

¹ ALJ Order (May 27, 2015) at 1.

Respondent raises three defenses: (1) claimant's injury, medical condition and need for medical treatment was the natural and probable consequence of a preexisting congenital condition; (2) claimant's alleged accident was not the prevailing factor causing her injury, medical condition and resulting disability; and (3) claimant's alleged accident was the triggering or precipitating factor that rendered her preexisting condition symptomatic.

Claimant requests the preliminary hearing Order be affirmed.

The sole issue is: did claimant sustain an accidental right wrist injury arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant operated a machine that made cups. The cups went into boxes, which claimant placed on pallets. Around 2 a.m. on June 2, 2013, claimant was placing a box on the top level of boxes on a pallet and a box fell. Claimant used her hands to shield her face and the box struck her right wrist causing immediate pain and swelling. She went to the emergency room where a cast, "[b]ut not like a real cast,"² was placed on her wrist and she was sent to see Dr. Neal Lintecum. Claimant denied having any right wrist pain prior to June 2, 2013.

After the June 2, 2013, incident, claimant did not return to work for respondent. Since November 18, 2014, claimant works for a different employer in customer service, 40 hours a week and constantly types. Claimant testified she still has right wrist swelling and constant right wrist pain.

A July 24, 2013, letter from Dr. Lintecum stated, "There is [a] question about causation with Ms. Lopez Prado's injury here. She says she was asymptomatic prior to the injury with the box falling on her wrist. If that is indeed the case, then it would seem that the injury with the box was the precipitating event."³ Dr. Lintecum's medical records were not placed into evidence.

At respondent's request, claimant was evaluated by Dr. Erich J. Lingenfelter on August 23, 2013. The doctor noted claimant had right wrist swelling and mild pain. Dr. Lingenfelter noted that an MRI showed reciprocal cystic changes in the carpus, reciprocal changes at the end of the ulna consistent with degenerative changes and overlying chondromalacia. The doctor indicated the MRI also showed some edema at the tip of the ulnar styloid and chondral changes with subchondral cystic changes. He noted

² P.H. Trans. at 8.

³ *Id.*, Cl. Ex. 2.

the MRI revealed no evidence of a TFCC tear and his impression was ulnar impaction syndrome. Dr. Lingenfelter opined:

We were asked to give a second opinion regarding the etiology of this and the terms of causation. Chondromalacia is a wear and tear degenerative process. Focal chondral defects can occur as a result of a direct blow, but this is usually a direct absolutely loading, not merely striking the wrist. On top of this, I might add when one has chondromalacia, although this can be flared up and exacerbated by trauma, this should not be compensable under Workers Compensation. Reciprocal changes in the carpus in relationship to the ulnar styloid confirms degenerative changes and confirms preexisting pathology. You cannot get cystic changes in the bones without there being a degenerative process. This is pathognomonic of a degenerative process. Therefore, I strongly feel, based on the evidence provided as well as the history and the mechanism that would not induce this problem acutely, that this is exacerbation of her preexisting condition. . . .⁴

Dr. Edward J. Prostic evaluated claimant on October 22, 2013, at the request of her attorney. Dr. Prostic took x-rays that showed the appearance of cysts at the ulnar styloid. He also noted claimant's MRI showed mild tendinopathy of the extensor carpi ulnaris and findings consistent with ulnar impaction syndrome. The doctor's short and succinct report does not indicate he reviewed claimant's MRI. Dr. Prostic opined claimant was having some rotator cuff dysfunction and ulnar impaction syndrome. The doctor opined: "The work-related injury sustained June 2, 2013 while employed by Berry Plastics Corporation is the prevailing factor in the injury, the medical condition, and the need for medical treatment."⁵

The parties entered into an agreed order referring claimant for an evaluation with Dr. Brian J. Divelbiss, who saw claimant on April 9, 2014. The doctor reviewed the reports of Drs. Lingenfelter and Prostic and claimant's medical records, including a July 19, 2013, right wrist arthrogram and MRI study ordered by Dr. Lintecum. Dr. Divelbiss indicated Dr. Lintecum discussed proceeding with a right wrist arthroscopy with ulnar shortening osteotomy secondary to ulnar impaction syndrome. Dr. Divelbiss' assessment was ulnar impaction syndrome and he stated:

I would agree with Dr. Lingenfelter that this situation represents an exacerbation or flare of an underlying pre-existing asymptomatic condition. I believe at this time her primary issue is the ulnar impaction syndrome which was present well before the work-related injury. I do not believe that her wrist contusion would be producing persistent symptoms if she did not have a pre-existing ulnar impaction syndrome. The findings on the MRI which show chondromalacia are indicative of a long-standing process that predated her work-related injury. While she may benefit from

⁴ *Id.*, Resp. Ex. B at 1-2.

⁵ *Id.*, Cl. Ex. 1 at 2-3.

an ulnar shortening osteotomy, I do not believe that her work-related injury is the prevailing cause of her ulnar impaction syndrome.⁶

By order of the ALJ, claimant was sent to Dr. Regina M. Nouhan for another independent medical evaluation. The doctor reviewed the reports of Drs. Lingenfelter, Probst and Divelbiss and claimant's medical records, including a right wrist arthrogram and MRI study obtained by Dr. Lintecum. In her February 2, 2015, report, Dr. Nouhan stated:

But the question that has been put forth is whether or not the injury to the patient's right wrist (sustained on 6/2/13) is the prevailing cause for her current symptoms, and I think there is a fine line between "symptoms" and "syndrome." One can have a syndrome that is relatively asymptomatic and not be in need of surgical or other treatment intervention, or one may have developed a baseline syndrome that is now so symptomatic that it impairs the patient's ability to work and do activities of daily living and requires treatment. In my opinion, the [workplace] injury that occurred on 6/2/13 was the prevailing factor in converting the patient's baseline ulnar impaction syndrome into one that is now symptomatic and requires treatment. Prior to this, there was no evidence that the patient had symptomatology related to her underlying ulnar impaction syndrome. I believe this work injury was the "tipping point" to convert an asymptomatic condition to one requiring treatment.⁷

ALJ Avery wrote a letter to Dr. Nouhan dated May 6, 2015, seeking clarification, wherein he asked:

In order to be considered a "prevailing factor" under the Kansas Workers Compensation Act, an accident, such as the one on June 2, 2013, must be the primary cause of the injury, medical condition and disability or impairment, if any. An "injury," under the Act, is "*any lesion or change in the physical structure of the body, causing damage or harm thereto.*" My question to you is therefore this: Was the claimant's accident of June 2, 2013 the primary cause of a distinct injury and medical condition, as defined by the Act, and as represented by the symptomatology you identified?

Dr. Nouhan replied in a May 12, 2015, letter:

Regarding this patient's situation, I think that her workplace injury sustained on June 2, 2013 is the primary reason she has pain and inflammation, requiring surgical intervention.

The patient did have a condition called ulnar impaction syndrome, that in my opinion was a result of the combination of her baseline anatomy and her workplace activities prior to June 2, 2013, which laid the groundwork in this case, but it did not cause her

⁶ Divelbiss IME Report at 2.

⁷ Nouhan IME Report at 2.

to require surgery. The injury sustained on June 2, 2013 caused her need for surgery.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁹

K.S.A. 2013 Supp. 44-508(d) provides:

“Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f), in part, states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

⁸ K.S.A. 2013 Supp. 44-501b(c).

⁹ K.S.A. 2013 Supp. 44-508(h).

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Five physicians have rendered opinions concerning the cause of claimant's injury or whether her work accident was the prevailing factor causing her injury, medical condition and need for medical treatment. All five doctors diagnosed claimant with ulnar impaction syndrome. The treating physician's medical records were not placed into evidence, which mystifies this Board Member. The compensability of this claim turns on the opinions of the five physicians.

Dr. Prostic, claimant's expert, provided little insight. Without adequately explaining, Dr. Prostic opined claimant's work-related injury sustained on June 2, 2013, was the prevailing factor causing her medical condition and the need for medical treatment. Dr. Prostic was the only hired expert who did not indicate claimant's ulnar impaction syndrome preexisted her work accident.

Dr. Lintecum's letter does little to support claimant's position. He indicated claimant was asymptomatic prior to her accident and the accident was the precipitating event. That falls short of an opinion that her accident was the prevailing factor causing her injury, medical condition and need for medical treatment. His statement supports respondent's contention that claimant's accident was the triggering or precipitating factor causing her preexisting asymptomatic ulnar impaction syndrome to become symptomatic.

Dr. Lingenfelter opined claimant's accident exacerbated or aggravated her preexisting condition. Dr. Lingenfelter's opinions are supported by the opinions of Drs. Divelbiss and Nouhan, who provided court-ordered evaluations of claimant. Dr. Divelbiss clearly opined claimant's accident was not the prevailing factor causing her preexisting ulnar impaction syndrome, but merely exacerbated it.

Dr. Nouhan opined claimant's workplace injury was the primary reason she has pain and inflammation, requiring surgical intervention. That appears to support the ALJ's finding that claimant's work accident was the prevailing factor causing her injury, medical condition and disability and his conclusion claimant suffered a new injury resulting in swelling and pain. However, a closer examination of Dr. Nouhan's report and subsequent letter reveals they do not support the ALJ's findings and conclusions.

Dr. Nouhan, like Drs. Lingenfelter and Divelbiss, indicated claimant had preexisting asymptomatic ulnar impaction syndrome. Dr. Nouhan opined claimant's accident was the prevailing factor converting claimant's baseline ulnar impaction syndrome into one that is

symptomatic and requires treatment. Under K.S.A. 2013 Supp. 44-508(f)(2), such an injury is not compensable.

In summary, this Board Member finds claimant failed to prove her accident was the prevailing factor causing her injury, medical condition and need for medical treatment and claimant's accident was the triggering or precipitating factor that rendered her preexisting asymptomatic ulnar impaction syndrome symptomatic.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member reverses the May 27, 2015, preliminary hearing Order for Medical Treatment entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of August, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge

¹⁰ K.S.A. 2014 Supp. 44-534a.

¹¹ K.S.A. 2014 Supp. 44-555c(j).